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No.: **ICC-01/09**
Date: **11 March 2011**

PRE-TRIAL CHAMBER II

Before: Judge Ekaterina Trendafilova, Presiding Judge
Judge Hans-Peter Kaul
Judge Cuno Tarfusser

Registrar: Ms Silvana Arbia

SITUATION IN THE REPUBLIC OF KENYA

Public

Prosecutor's Request for Reclassification

Source: The Office of the Prosecutor

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Introduction

1. On 3 November 2010, Pre-Trial Chamber II (the “Chamber”) ordered the Victims Participation and Reparations Section (the “VPRS”) to “perform an analysis of [any victims] applications following the requirements of rule 85”, which “shall be prepared in order to be included in a report pursuant to regulation 86(5) of the Regulations to be later submitted to the Chamber. The Report shall also include an assessment as to which applications might be accepted, rejected, or raise difficult issues.”¹
2. On 4 February 2011, the Registry filed the “First Periodic Report of the Registry on the Activities of the Victims Participation and Reparations Section in the Situation in the Republic of Kenya” (the “Report”).²
3. On 24 February 2011 the Prosecution was put on notice that the Registry had filed the Report and two annexes.³ The Report and the two annexes remain *ex parte* only available to the Registry. According to the Registry they were filed under that classification as they “concern [...] an internal communication between the Chamber and the Registry”.⁴
4. Pursuant to Article 68(1) and Regulations 23*bis* (3) and 24*bis* (2) of the Regulations of the Court, the Prosecution requests that the Report and the two annexes thereto be re-classified as *ex parte*, available to the Registry and the Prosecution only, unless the Chamber determines that the Prosecution’s knowledge of the content of the Report and the two annexes does not defeat their purpose.

¹ ICC-01/09-24, paras. 19-20.

² See ICC-01/09-49, footnote 2.

³ ICC-01/09-49.

⁴ ICC-01/09-49, p.3.

Submissions

5. The Registry filed the Report and the annexes confidential *ex parte* available only to the Registry, as, in its view, they concern “an internal communication between the Chamber and the Registry”.⁵ The Prosecution submits that the classification given to these documents by the Registry is inconsistent with Regulation 24*bis*.

6. The Registrar may make oral or written submissions if the submissions are “necessary for the proper discharge of her functions, in so far as they relate to any proceedings”.⁶ The Prosecution does not dispute that this Report falls within the terms of Regulation 24*bis* (1): the Report and its annexes were filed pursuant to an order issued by the Chamber, to inform the Chamber’s decision on victims’ applications to participate in the proceedings.⁷ In particular, the Chamber ordered that “[t]he report shall [...] include an assessment as to which applications might be accepted, rejected, or raise difficult issues”.⁸

7. Regulation 24*bis* establishes a presumption that the Prosecution (as well as other participants) shall be notified of oral or written submissions made by the Registry to the Chamber though “[t]he Registrar may file a document *ex parte* ‘Registrar only’ if knowledge by the participants of the content of the document filed would defeat its purpose”.

8. According to Regulation 23*bis* (1) “[a]ny document filed by the Registrar [...] and marked ‘*ex parte*’ [...] shall state the factual and legal basis for the chosen classification [...]” This means that in relation to any document filed pursuant to Regulation 24*bis* (2), the Registry must explain why access by the Prosecution to the content of that document would defeat the purpose of the filing.

⁵ ICC-01/09-49, p.3.

⁶ Regulation 24*bis* (1).

⁷ See in particular Regulations 86(6)-(8).

⁸ ICC-01/09-24, para. 20.

9. In this case, the Registry has failed to explain the basis for its request. The reasoning provided was limited to its concern that the Report and Annexes constitute “an internal communication between the Chamber and the Registry”.⁹ That explanation is facially inadequate: there is no exception within Regulation 24*bis* for “internal communications” between Chamber and Registry; there is no reason why internal communications would be regarded as *per se* secret; and it is highly questionable whether written communications filed in the record pertaining to *sub judice* matters before a Chamber could be properly considered to be “internal”.¹⁰ Additionally, the Registry’s position appears to be that the purpose of its filing is to communicate secretly to the Chamber. It is thus a circular argument – the Registry wants to communicate confidentially, therefore disclosure necessarily will defeat the purpose, which is to communicate confidentially – that cannot suffice to constitute a factual and legal basis for the *ex parte* classification or otherwise be consistent with the meaning of Regulation 24*bis*.

10. The Prosecution submits that when the Registry has filed a document *ex parte*, Registry only, the Chamber shall require more than that the document is intended to be an internal communication. There must be an objective legal and factual basis for the Registry’s chosen classification, and the basis must relate specifically to the content of the Report. It is not enough that the Registry says it is an internal communication and for that reason alone cannot be disclosed.

11. Regulation 23*bis*, moreover, empowers the Chamber to evaluate and, where appropriate, override the classification chosen by the Registrar. In evaluating the suitability of an *ex parte* classification, the Chamber should determine whether the submission falls within the scope of Regulation 24*bis*, whether knowledge by the Prosecution of the *content* of the Registrar’s submission would defeat the Report’s purpose, and whether lesser measures – such as redaction of discrete portions –

⁹ ICC-01/09-49, p.3.

¹⁰ See footnote 9 above.

would balance the Prosecution's rights and the Registry's legitimate demonstrable interest.

12. The Prosecution also submits that there is no presumptive factual or legal justification for denying it access to the Report on victims' applications.

13. The Prosecution acknowledges that on three occasions, Chambers of this Court have denied the Prosecution access to reports prepared by the VPRS in relation to victims' applications on the grounds that there was no express provision in the Court's regulatory framework which would require a Chamber to transmit the Report to the participants.¹¹ Two of these three decisions were issued prior to 18 December 2007, when Regulations 23*bis* and 24*bis*, entered into force. This is no longer the case as Regulations 23*bis* and 24*bis* apply. The third decision that was issued after 18 December 2007 did not refer to Regulation 24*bis* and therefore erroneously followed the prior practice by concluding that "neither the Statute nor its Rules and Regulations provide for the Report to be transmitted to the Prosecution and the Defence".¹²

14. In addition, in the context of one of those decisions, Trial Chamber I found that the absence of any legal provision that would require the Report to be shared with the parties "is not determinative of the issue, because the Trial Chamber undoubtedly has the authority to control disclosure for the purposes of the trial in the interests of justice".¹³ In that case, Trial Chamber I found that the parties did not need access to the relevant reports because those reports contained only information that was independently available to the parties under Rule 89(1) in the victims' applications themselves. Thus, the Chamber explained, since the Reports did not include "preliminary assessments" by the VPRS, there was no risk that the Chamber would be "influence[d] by extraneous matters such as the judgement of others".¹⁴

¹¹ See ICC-01/04-374, 17 August 2007, paras. 34 and 38; ICC-01/04-01/06-1022, 9 November 2007, para. 25; ICC-02/05-01/09-62, 10 December 2009, para. 16.

¹² ICC-02/05-01/09-62, 10 December 2009, para. 16.

¹³ ICC-01/04-01/06-1022, 9 November 2007, para. 25.

¹⁴ ICC-01/04-01/06-1022, 9 November 2007, para. 24.

Thus, it was not necessary that the parties be in a position to assess the potential influences on the Chamber's determination and be able to respond accordingly.

15. This is not the case for the Report at hand, which according to the express order of the Chamber includes information that is not included in the victims' applications that are provided to the Prosecution. According to the Chamber, the Report was to contain "an assessment [by the VPRS] as to which applications might be accepted, rejected, or raise difficult issues".¹⁵ Since the assessment will inform the Chamber's decision on the victims' applications, it is in the interest of fairness and a proper adjudication of the matters that the Prosecution have access to the Report in order to ensure that it can assist the Chamber with its submissions in reply to the applications pursuant to Rule 89(1).¹⁶

16. Moreover, since the adoption of Regulation 24*bis*, any disclosure order in relation to submissions by the Registry, in the interest of justice must take into consideration that disclosure must be granted unless knowledge by the Prosecution of the content of a submission would defeat its purpose or there are additional legal grounds to restrict the parties' access to the submission, such as interests of protection pursuant to Article 68(1).

17. Finally, mindful of the duty of the Court as a whole pursuant to Article 68(1) to ensure that victims and witnesses are appropriately protected, the Prosecution submits that no security risks are likely to result from re-classification of the Report and its two annexes as *ex parte*, Registry and Prosecution only. The Prosecution does not pose any security threat to persons interacting with the Court. In addition, if the Report relates to persons who interact with the Prosecution, it must be aware of all facts and circumstances that have an impact on their security, as their protection also falls within the mandate of the Prosecution.

¹⁵ ICC-01/09-24, para. 20.

¹⁶ See for instance Appeals Chamber in ICC-01/04-01/07-476 OA2, para. 63; ICC-01/04-01/07-475 OA, para. 73, which refer to the adversarial nature of the proceedings.

18. But given the current tense security situation in Kenya and the concomitant need to preserve confidentiality of the identity of victims and witnesses interacting with the Court, the Prosecution submits that at this time it is not safe to grant access to the Report and its annexes beyond the Registry and the Prosecution.

Conclusion

19. In this case, the Registry has failed to comply with its duties under Regulations 23*bis* and 24*bis*. In order to remedy any prejudice that might result from this shortcoming, the Prosecution requests the Chamber to review the content of the Report and its two annexes and to determine whether knowledge by the Prosecution would defeat the purpose of the documents. If the Chamber concludes that this is not the case, then the Chamber should order that the Report and its two annexes be reclassified as *ex parte*, Registry and Prosecution only.

20. If the Chamber finds that knowledge by the Prosecution of some portions of the Report or its annexes would defeat their purpose, then the Chamber should consider whether it is possible to redact discretion portions of the documents and provide the Prosecution with a redacted version thereof.



Luis Moreno-Ocampo, Prosecutor

Dated this 11th day of March 2011

At The Hague, The Netherlands